95-1331

(1)

Supreme Court
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BERNICE ORTIZ,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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54 pp

Question Presented

Is the Second Circuit wrong, under this Court's decision in *Landano v. Department of Justice*, 508 U.S.___, 113 S.Ct. 2014, 124 L.Ed. 2d. 84 (1993) in authorizing the Social Security Department's refusal, under the Freedom of Information Act, to release to an elderly sick woman an unsolicited, unsigned, unsubstantiated letter when that letter attempted unsuccessfully to deprive her of her benefits when the refusal is based on an automatic blanket policy, justified, after the fact, in part because she could use that letter in a law suit against a former landlord based on other acts of slander and harassment?

Listing of Parties

The petitioner, Bernice Ortiz, is a citizen of the United States.

The Respondent, The United States Department of Health and Human Services, is an agency of the Federal Government.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bernice Ortiz respectfully asks that a writ of certiorari be issued to review the judgement and opinion (the "Opinion") of the United States Court of Appeals entered November 22, 1995.

OPINIONS BELOW

The Opinion of the Court of Appeals (A1-A9) is reported at 70 F3rd 729 (1995). The Opinion of the District Court (A10-A27) is reported at 874 F. Supp. 570.

JURISDICTION

The Opinion and Judgment was issued on November 22, 1995. The jurisdiction of this Court is invoked under 28 USC 1254(1)

STATUTE INVOLVED

Pertinent provisions of 5 USC 552 are reproduced below (A-28-A-33).

STATEMENT OF THE CASE

1. Requesting the Letter

The Petitioner, an elderly woman, was systematically harassed by her landlord in order to drive her out of her home - which he eventually did. He accomplished this result not only by stopping services and destroying her home life but also by filing false complaints about her, informing authorities that she lied about her age in order to get rent subsidies and her pension. He cost her that pension until the Federal Courts remedied that deprivation. These lies and associated mistreatment precipitated a law suit (eventually settled) against the landlord for tortious tenant harassment.

The Petitioner wanted to have the full range of evidence of the landlord's harassment so she could both protect herself and pursue a law suit. Consequently, when she found out there was a letter complaining about her that had been sent to the Social Security department trying to get her thrown off Social Security and perhaps prosecuted for fraud, she requested the letter under the Freedom of Information Act. She believed she was entitled to know as a citizen, who was accusing her falsely and, as a member of the public, how the Social Security department handled such slanderous unsubstantiated accusations. The investigation, when completed, though very upsetting to her, established that she had not lied about her age and her benefits accordingly were not disturbed.

The Social Security Department has a blanket rule of denying any Freedom of Information Requests about any and all complaints filed with them. They make no individualized determinations ever and did not in this case. On the other hand, they have explicit internal rules that they do not promise confidentiality to "informants". In this case, when confronted with suggestions that stipulations could be entered into which would confine the use of the letter any way they wanted,

including just as evidence in the law suit already filed, the Social Security Department refused based on the blanket rule. At depositions and in answers they gave no reasons for following that blanket rule and never mentioned any "hot line" (presumably because their telephone hot line maintained for all complaints and allegations does not promise confidentiality).

2. The Decision of the District Court

After the appeals process was exhausted in the agency, the petitioner applied to the Federal District Court and was denied the document (examined in chambers) on the grounds that the "hot line", (which had been raised for the first time in respondent's briefs after close of discovery), meant there was an implicit promise of confidentiality to everybody who filed *any* accusation with the Social Security department.

3. The Decision of the Court of Appeals

The Second Circuit affirmed, primarily on the grounds that an unsigned letter was an implicit request for confidentiality and that use of the document in a law suit was precisely the type of retaliation that the act designated as a reason not to release a document, even to a person wrongly slandered.

Neither decision discussed, at any length, the controlling precedent from this court of *Landano, supra* which would seem to require the release of the document.

REASONS FOR GRANTING THE WRIT

The Freedom of Information Act is an important piece of legislation passed to further participatory democracy. This Court established guidelines to make sure that it was properly implemented even in cases where people implicated in heinous crimes sought to take advantage of its provisions. These guidelines, clear and established in difficult cases, are important and should be implemented for the use of citizens to know how the government deals with accusations, particularly unfounded dangerous accusations, and for those citizens to use those provisions to invoke lawful remedies. The Second

Circuit decision flies in the face of the *Landano* guidelines and must be reversed so that the Courts and agencies know they must follow this Court's analysis and teaching. If this Second Circuit misinterpretation, misapplication, and vitiation of *Landano* is not corrected by this Court, courts in the Second Circuit, perhaps all lower courts, and the agencies will continue to deny documents arbitrarily thereby destroying the rights of individuals requesting, the public seeking knowledge, and the efficient administration of this important Statute. *Certiorari* should therefore issue.

This Court has issued definitive guidelines and pronounced the governing principles for this case. *Landano v. Department of Justice, supra.* established that, given the strong presumption in favor of document release under the Freedom of Information Act, its policy, principles, and purpose, the government has a heavy burden to overcome in order to thwart release of requested documents -- one satisfied only by demonstrating a critical mass of objections, either in a cluster of crucial factors (or one overwhelming one.)

The Court in *Landano* held that numerous records compiled in an FBI investigation of an alleged criminal gang-murderer must be produced. *A fortiori,* the letter must be produced here - the petitioner, an elderly retired woman, has no criminal associations and had been absolved of any wrongdoing; was not investigated as part of an FBI criminal investigation; was subjected to suffering as a result of one unsigned, unsolicited letter; and, would promise to use it only as evidence in an ongoing law suit. Moreover, *Landano* held that the government may *not* presume that all informants (*a fortiori* all accusers, particularly false ones) are presumptively confidential sources, but must make particularized determinations (which they did not here).

Landano may be the final definitive formulation of the factors and their importance in overcoming the burden necessary to resist the federal statute's policy and principles, but it also is consistent with all Supreme Court guidance given to the public, law enforcement, civil agencies, and the Courts in

other cases. The importance of the documents to individuals justifying extensive and intensive use of the Freedom of Information Act's provisions can be found at *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. ___, 127 L. Ed. 2d. 325, 114 S. Ct. 1006, 975 F2d. 1105. For standards of believing that confidentiality was invoked see, *Renegotiation Board v. Bannercraft Clothing, Co.*, 415 US 1 (1974), 39 L. Ed. 2d. 123, 94 S. Ct. 1028. For a discussion of the strong presumption in favor of production of sought documents and the purpose of the Freedom of Information Act, see *United States Department of State v. Michael D. Ray*, 502 US___, 116 L. Ed.2d. 526 (1991), particularly at 540 and citations therein. For the importance of having a real ongoing criminal investigation see *NLRB v. Robbins Tire and Rubber Co.*, 437 US 214 (1978), 57 L. Ed. 2d. 159, 98 S. Ct. 2311. The Second Circuit ignored all these teachings and acted against the instructions delivered by this Court which is why this Court should grant *Certiorari*.

In the Second Circuit opinion to be scrutinized, it should be noted that *Landano* is only discussed as laying out general principles, while glossing over the facts (eg. "the little similarity of this case to the gang-related murder in *Landano*" is considered irrelevant.) The cases cited by that Court to establish the legal basis for refusal to release the document are lower Court opinions which pre-date *Landano* (which, actually, in the opinion of the Petitioner support a different result than the Second Circuit reached.) The Second Circuit discussion (examined following in certain pivotal analyses and rationale) satisfied neither reason nor this Court's precedent.

No Risk of Retaliation

The Second Circuit invoked the issue of "retaliation". This Court in *Landano* listed a number of circumstances where a true risk of retaliation might be found (at 2019). All but one involved violence, danger, and crime. (The one presented "strong potential for harassment" as part of an "anti-government" crusade). None of these circumstances, or anything remotely analagous, are present here.

No Harm From Release of Document

The Second Circuit held that the Petitioner's proposed use of the unsigned, unsubstantiated, accusatory letter in an ongoing law suit against the probable perpetuator was the "precise harm" that the exemption was designed to prevent. Commenting that "her candor in communications with HHS and her complaint and supporting affidavit makes explicit that this is precisely the type of situation that the statutory exemption seeks to address" (ie. suing the author of the letter), the Second Circuit proffered this as **the** factor to carry the heavy burden of proof - the protection of the unsigned utterer of rejected claims from the release of evidence of his wrongdoing to be used to prove a pattern of such wrongdoing in a civil law suit.

Even the Respondent, in answer or depositions, did not list "use in law suits" as a reason to deny the requested document. Rather at depositions they stated that the rationale for denial was fear of a "punch in the nose" and that they, using "boilerplate", never released letters alleging wrongdoing by Social Security recipients in conjunction with this worry. (This general rule has apparently always been the rule and still continues even after *Landano* established the need for a more particularized analysis).

Use of the undisclosed letter in a law suit is not a punch in the nose. (Note, the principles in the 6th Amendment and 16B of the Federal Rules of Criminal Procedure establish the right to face your accuser in formal proceedings.) One rationale of directing people to court rooms to settle disputes is to avoid physical or other means of disputation - in this case, an elderly woman was not permitted to stipulate that she would only use the letter in this non-violent way. (Protection of government whistle blowers under 5 USC 1221 indicates, that in absence of such a whistle blower statute, no protection is to be inferred for an unsolicited, non-governmental letter, which, of course could not rely on a specific promise of confidentiality). Access to the Courts by those aggrieved forms a fundamental ideal of our Constitutional democracy, not a danger that the

legislature wished to avoid in opening up access to the Government.

Unsupported claims against the Petitioner by her landlord had already resulted in considerable litigation to restore her pension. See *Ortiz v. Regan* in its various reported appearances: 777 F. Supp. 1185 (SDNY; 1991), 769 F. Supp. 570 (SDNY; 1991); 749 F. Supp. 12154 (SDNY; 1990) 980 F 2nd 138 (2nd Cir. 1992). Surely the Courts' interest in efficiency; the public's interest in preventing cut-off of entitled people, and prevention of destructive use of purposely false statements to the government agency and the Petitioner would have been better served if Petitioner had received the document she requested before litigation, to restore her pension. (Although only all the Judges and Respondent have seen the letter in question, as Petitioner's counsel never saw it, no one has disputed the belief of the Petitioner that the letter was part of a practice and pattern of harassment - and the Second Circuit in talking of its use, implicitly admits this characterization.) Perhaps before the investigation (and other litigation) was complete, the malicious submission could have been protected - but not after it was found to be without basis.

One unsigned unsolicited letter no longer considered viable is neither compiled nor part of an ongoing criminal investigation. It should be therefore available for any lawful use including a law suit.

In fact, the aggrieved party was the Petitioner. (The person now protected from release of this wrongful slander had probably committed a crime under 18 USC 1001.) Even though the investigation has terminated, this letter still poses a worry to the Petitioner and a threat to her in the future with a letter claiming fraud lurking in her files (and she, like the public, should know how and why the government launches investigations on such unsolicited unsupported assertions without any knowledge of who filed it, except that it is not from a law officer.) It is her right that is crucial - and the denial which hurts her. Seeking her lawful legal remedies should

not diminish her rights to relief under the Freedom of Information Act.

Were she not so candid that she wanted to confine her protests to a Court, but merely just asked for it would the Second Circuit then grant her request? Surely, confining its use to the Courts, is nothing the Courts should call "harm." (Cf. the agency's obligation to work with the requestor *Ruotola & Ruotola v. Department of Justice*, 53 F. 3rd. 4 (2nd Cir; 1995).

Privacy

Whose privacy is at stake? The Second Circuit decided it as the person who violated Petitioner's rights. The Petitioner believes this Court has established that it is her right to privacy that is at stake - not the person who harmed her.

The fundamental principle has been stated by this Court. "The privacy interest protected...`encompasses the individual's control of information concerning his or her person." *United States Department of Defense v. FLRA, supra.* (Legislative history supports this interpretation 21974 US-CAN 6267, 6291-2).

An elderly woman dependent on Social Security ("An act...unusually protective of claimants" - *Bowen v. City of New York*, 476 US 467 (1986) at 480) had her benefits placed in jeopardy by a false malicious unsigned accusation. It is she who is the victim who needs protection, not the liar who was harassing her. (See for a recognition of this point in the same jurisdiction, *Jane Doe v. United States Civil Service Commission*, 483 F. Supp. 539 (SDNY; 1980) at 579-80). It is her privacy which has been violated, not the harassing slanderer who smeared her to the government.

No Request or Expectation of Confidentiality

The Second Circuit, in its search to find a request for confidentiality (since the letter was not received pursuant to a proffer of such an assurance) relied on two factors: (1) The

lack of signature and (2) The existence of a Hotline for phone complaints.

i.

Not Signing is Not a Request for Non-Release

The Court argued for "a common sense interpretation of anonymity as the desire to keep one's identity secret for any and all purposes" rejecting petitioner's argument that "(I)f the letter-writer's expectation was that the letter would be kept secret...there would have been no need for the letter-writer to sign the letter. The lack of signature is proof-positive that the letter-writer anticipated that the letter might be provided to Mrs. Ortiz." Regardless of which interpretation is more reasonable, and petitioner asserts she has the better of the argument since the letter (which in no way apparently ever requested confidentiality but only was unsigned) must be judged under the standard that a particular request must be judged on its individual merits - it must be established for the particular document rather than inferred even for those who provide the FBI with information. See *Landano* at 2021-23. But, the agency itself made no such interpretation, but, instead merely invoked "boilerplate". (They do not even have a particular policy that unsigned letters shall be construed as requests for non-release, even assuming that is reasonable.) Nor was there an individual interpretation that this letter, read in conjunction with no signature, meant that it was to be kept away from the reader.

In fact, with the lack of signature, it made it more difficult to conduct an investigation or inquire whether such non-release or "confidentiality" was, in fact, expected or even sought. (No such claim has been made on the basis of the text of that letter but rather the Second Circuit was concerned that the issuer of the false accusations spoke in such a way that the Petitioner could identify that individual - which Petitioner had already in "candor" affirmed. If it had not been that individual, Petitioner was prepared to stipulate that the matter would end - all she sought was to protect herself from that individual who was known to harass her.) The Second Circuit focused

on the inflammatory language in the letter - apparently the greater the slander, the more unsubstantiated the claim, the greater the protection generated for its sponsor under this analysis. To state such a position is to prove its absurdity - and how far the Second Circuit has strayed from the paths established by *Landano.*

ii

Phone Hotline Does Not Offer Confidentiality for Letters

The agency, in depositions and proffered defenses, never raised the issue of the Hotline, at all (let alone implying an assurance of confidentiality) relied on by the District and Appellate Courts. There is nothing in the record that indicates the Hotline was ever connected to the one page letter; was known by the writer of that letter; or invoked by anyone in the Agency to justify refusal under the Freedom of Information Act. Moreover, the Social Security Department could not so justify a claim of confidentiality offered, as not only is none promised on that Hotline, but also internal Social Security interpretations prevent such promises. "When the question of confidentiality is raised by an informant or a prospective informant, SSA: ...does not offer or discuss a guarantee that the informants identity will never be disclosed." POMS GN 04120.0120. Rather, "Information obtained from third parties, whether solicited or volunteered **cannot** be withheld from number holders when the information becomes a part of the claims folder." (emphasis added) POMS DNI 30501.030. POMS are the Social Security Administration's interpretations of statutes and regulations. *Ruppert v. Secretary of the United States Department of Health and Human Services*, 671 F. Supp 151 fn 3 at p. 158. (E.D.N.Y. 1987).

Not Compilation in Ongoing Investigation

Under the pre-*Landano* standard of compilation, this one unsigned letter sent in, out of the blue, was not part of a "compilation of information...for the purpose of law enforcement", *Ferguson v Federal Bureau of Investigation*,

957 F2nd 1059 (2nd Circ. 1982). An ongoing investigation appears to be usually essential. See eg. *NLRB v. Robbins Tire and Rubber Co., supra,* 57 L. Ed. 2d. 159, 98 S. Ct. 2311 and in the same jurisdiction *Malizia v. United States Department of Justice*, 519 F. Supp. 338 (SDNY 1981). Maybe before the investigation established there was no wrong doing on which to deprive the petitioner or to sanction her, the malicious submission could have been protected, but such an argument is not available here.

One letter, one lie, was sent to the Social Security Department. This was part of a pattern of harrassment intended to drive an elderly lady out into the streets and impoverish her.

Petitioner sought that letter and had a right to that letter. This Court has given that right to many others in much less appealing circumstances. Petitioner and the public have a right to see that unsigned letter; she to use it in a law suit, the public to know what goes on in that agency. No invocation of obsolete lower court cases, no conjectures about Hotlines, no verbal stretching of compilation and investigation should prevent what is obvious - this woman has a right to see a letter, which was found baseless, and on which harm to her was and may be based.

CONCLUSION

The Writ of Certiorari should issue.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

BERNICE ORTIZ,

Plaintiff(s),

- against-

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant(s).

----------X

92 Civ. 0562 (JES)

MEMORANDUM OPINION AND ORDER

SPRIZZO, D.J.,

Plaintiff brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1988), to obtain an anonymous letter (the "letter") to the Social Security Administration containing allegations about the plaintiff. Defendant, the Department of Health and Human Services ("HHS" or the "Government"), withheld the letter from release on the grounds that disclosure of the letter would reasonably be expected to invade the privacy of the author and that the author is a confidential source of information for law enforcement purposes. The parties have stipulated to the admissibility of certain exhibits for judgment on an undisputed set of facts. *See* Stipulation to Admissibility of Exhibits dated February 18, 1994. For the reasons that follow, the Court finds that the letter is exempt from disclosure.

BACKGROUND

By letter dated November 14, 1989, plaintiff requested a copy of an anonymous letter sent to the HHS Regional Inspector General for Investigations in New York. *See* Complaint, Ex. A; Declaration of A. Ronald Santo dated February 22, 1993 ("Santo Decl.") ¶ 3. The letter makes allegations of improper conduct by plaintiff. *See* Santo Decl. ¶ 4. Plaintiff claims that those allegations led to a criminal investigation of

her age and identity in connection with her receipt of Social Security benefits. *See* Complaint, Ex. A. Ultimately, however, plaintiff was never prosecuted. *See* Joint Exhibit 2, Declaration of Frank J. Nahlik dated December 7, 1993 ("Nahlik Decl."), ¶ 6. In her request, plaintiff stated:

> "I request a copy of this letter because I have reason to believe that the information contained in it was procured illegally and that the allegations made in it are false, libelous and slanderous. I intend to take legal action against the parties responsible."

See Complaint, Ex. A.

The letter in question was located within the files of the Office of Inspector General for Investigations. *See* Santo Decl. ¶ 4. The agency withheld the letter by a decision dated March 19, 1990. *See* Complaint, Ex. 3. By letter dated April 9, 1991, plaintiff appealed the decision. *See* Complaint, Ex. C. On April 23, 1991, the agency affirmed its decision to withhold the letter in order to protect the author's privacy and because the author was a confidential source. *See* Complaint, Ex. D. This action followed.

DISCUSSION

After the Court denied the parties' cross-motions for summary judgment, the Government submitted the anonymous letter for the Court's *in camera* review so that the District Court could make a *de novo* determination of the validity of the agency's exemption claim. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). HHS claims that the anonymous letter is exempt under 5 U.S.C.A. §§ 552(b)(6), (b)(7)(C) and (b)(7)(D) (West 1972 & Supp. 1994).

Exemption 7(D) permits nondisclosure of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to disclose the identity of a confidential source. . . ." 5 U.S.C.A. § 552(b)(7)(D) (West Supp. 1994). This exemption applies to

the investigative files of HHS's Office of the Inspector General, in which this letter was located, *see* Santo Decl. ¶ 4, because that agency undertakes investigations that could lead to criminal prosecutions. *See New England Apple Council v. Donovan,* 725 F.2d 139, 143 (1st Cir. 1984) ("The functions of OIG ["Inspector General"] investigators are not so different from the functions of FBI agents as to warrant divergent treatment under FOIA exemption 7. . . .").

Under Exemption 7(D), the critical inquiry is "not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential." *United States Dep't of Justice v. Landano,* ___ U.S. ___, ___, 113 S. Ct. 2014, 2019 (1993). A source is confidential if it "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Id.* (*quoting* S. Rep. No. 93-1200, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6291). Since the anonymous letter at issue here was not solicited by the Government, and therefore the Government cannot claim that it provided the author with an express assurance of confidentiality, the question before the Court is whether the circumstances under which the anonymous source conveyed the information in the letter support a reasonable inference of an assurance of confidentiality.

In *Landano,* the Supreme Court considered the evidentiary showing that the government must make in order to establish that a source provided information based on an implied assurance of confidentiality. The Supreme Court rejected the argument that there is a presumption that *all* sources supplying information to law enforcement in the course of a criminal investigation are confidential. However, the Court held that more narrowly-defined circumstances can provide a basis for inferring an implied assurance of confidentiality. *Id.* at 2023. For example, the Court observed that nondisclosure could be justified by examining "the nature of the crime that was investigated or the source's relation to it." *Id.* at 2024. Particular circumstances that could give rise to an inference of

confidentiality also include "the risks an informant might face were [his or her] identity disclosed, such as retaliation, reprisal or harassment." *Massey v. FBI,* 3 F.3d 620, 623 (2d Cir. 1993).

Here, the government has provided a particularized showing of circumstances from which confidentiality can reasonably be inferred. The allegations could have lead to criminal proceedings, *see* Nahlik Decl. ¶¶ 6, 10(a) and (b), and strongly suggest that the anonymous source reasonably expected complete confidentiality. *See Providence Journal Co. v. U.S. Dep't of Army,* 981 F.2d 552, 565–66 (1st Cir. 1992) ("At least in circumstances where the allegations might lead to court-martial proceedings, it is reasonable to infer, absent contrary evidence, that an anonymous source reasonably expected complete confidentiality.").

Furthermore, because the letter contains highly personal information, it is likely that the anonymous source has a close relationship with the plaintiff. This is especially true since the plaintiff has declared that she is "almost absolutely sure" she knows the author's identity. *See* Affidavit of Bernice Ortiz dated December 9, 1991, ¶ 4; Complaint, Exs. A, E. Under these circumstances, the author's cooperation with the Government could have reasonably been expected to antagonize the plaintiff. *See* Nahlik Decl. ¶ 10(d). Moreover, given the likely close relationship between the author and the plaintiff, it is entirely reasonable to infer that the source knew that the plaintiff might retaliate for the author's implicating her in such an investigation. Indeed, the plaintiff has admitted that the underlying reason that she seeks disclosure of the letter is to identify and then sue the author. *See* Complaint, Ex. A. It is, therefore, reasonable to infer that the anonymous source knew that Ortiz would wish to retaliate and therefore "would hardly have made the charges unless [he or she] w[as] confident [his or her] identit[y] would remain concealed." *Pope v. United States,* 599 F.2d 1383, 1386 (5th Cir. 1979); *see also Nix v. United States,* 572 F.2d 998, 1003 (4th Cir. 1978); *Maroscia v. Levi,* 569 F.2d 1000, 1002 (7th Cir. 1977).

The fact that the letter was unsolicited does not negate this implied assurance of confidentiality where, as here, "the agency has somehow put the public on notice that it will accord such treatment to such communications." *Brant Constr. Co. v. EPA*, 778 F.2d 1258 (7th Cir. 1985) (finding unsolicited letters received by EPA containing allegations of improper conduct exempt from disclosure); *see also Pope, supra*, 599 F.2d at 1387 (unsolicited letters received by IRS which initiated investigation exempt); *Fedders Corp. v. Federal Trade Comm.*, 494 F. Supp. 325, 328 (S.D.N.Y. 1980) (unsolicited complaint letters to FTC exempt), *aff'd without opinion*, 646 F.2d 560 (2d Cir. 1980). Here, the Office of the Inspector General, Department of Health and Human Services, maintains a hotline operation to receive telephone calls and other communications from the public concerning possible instances of fraud or other illegal activity. HHS "encourage[s the public] to report fraud in connection with HHS programs to this hotline operation." Nahlik Decl. ¶ 7. Moreover, "it is unrealistic to assume that a majority of persons reporting to an agency what they believe to be illegal or improper acts are legally sophisticated [with regard to] the boundaries of the FOIA exemptions." *See Brant, supra*, 778 F.2d at 1263. The Court finds that these circumstances, viewed together, provide a sufficient basis for inferring that HHS has put the public on notice that it will protect the confidentiality of reports to its hotline operation.

Moreover, despite the fact that the author's name is not on the letter, there are numerous aspects of the letter itself that could lead to discovery of the author's identity. Among these are the typestyle and certain items of information that are mentioned in the letter that would reasonably be known only by a few persons. In addition, the grammar, syntax, and language usage in the letter could identify the author by his or her writing style or could indicate the author's educational level or national origin. *See New York Times Co. v. NASA*, 920 F.2d 1002, 1009 (D.C. Cir. 1990) (recognizing that "'syntactic felicity' or lack thereof would reveal 'information about the depth and breadth of [the author's] education'"). Having reviewed the letter *in camera*, the Court finds that

disclosure of the letter would be highly likely to identify the author and that, therefore, the lack of a signature on the letter does not afford a sufficient basis to protect the identity of the informant in this case.

Accordingly, the Court finds that since an implied assurance of confidentiality can reasonably be inferred and since disclosure of the letter, even in parts, is likely to reveal the identity of its author despite the lack of a signature, this letter fits within the confines of FOIA exemption 7(D) and therefore may be withheld from disclosure.

The Government relies also upon Exemption 7(C) to justify withholding the letter. Exemption 7(C) authorizes an agency to withhold records or information compiled for law enforcement purposes to the extent that revealing the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(b)(7)(C) (West Supp. 1994). Since Exemption 7(C) allows withholding only if an invasion of personal privacy is *unwarranted*, a court considering the applicability of the Exemption must balance the individual's privacy interest against the public interest in disclosure. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, supra,* 489 U.S. 749 (1989).

The privacy interest that Exemption 7(C) protects from disclosure encompasses not only the intimate details of an individual's life but also information that he or she could reasonably assert an option to withhold from the public at large because of its possible adverse effect. *See United States Dep't of Justice v. Reporters Comm., supra,* 489 U.S. at 763 (1989) ("privacy encompass[es] the individual's control of information concerning his or her person."). Therefore, courts have recognized that a source in a government investigation, such as the one conducted on Ortiz, has a substantial privacy interest in keeping his or her participation in the investigation private. *Dunkelberger v. Department of Justice,* 906 F.2d 779, 781 (D.C. Cir. 1990) ("[E]xemption 7(C) takes particular note of the 'strong interest' of individuals, whether they be

suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity.'"). Moreover, the source also has a strong privacy interest in not being unnecessarily questioned or harassed by those who look unfavorably upon law enforcement officials or by private litigants in civil suits incidentally related to the investigation. *See Diamond v. FBI*, 707 F.2d 75, 77 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984). This is especially true where, as here, in her request for disclosure, Ortiz has indicated a desire to sue the source upon discovery of his or her identity. *See* Complaint, Ex. A. In light of the potential for harassment, intrusion, and stigmatization resulting from disclosure of the source's connection with HHS's criminal investigation, the Court concludes that the author of this letter, which provoked a criminal investigation, has "a substantial interest in seeing that [his or her] participation remains a secret." *See Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (citation omitted).

On the other side of the scale is the public interest in disclosure of the letter. Only the interest of the general public, and not that of the private litigant, is relevant to this inquiry. *See Kiraly v. FBI*, 728 F.2d 273, 276 (6th Cir. 1984). Thus, the fact that Ortiz has a personal reason for seeking the information does not enter into the balancing process. *See United States Dep't of Defense v. FLRA*, 114 S. Ct. 1006, 1008 (1993) ("whether an invasion of privacy is warranted cannot turn on the purposes for which the . . . request is made"); *see also Massey, supra*, 3 F.3d at 625 (2d Cir. 1993) (quoting *Stone*, 727 F. Supp. 662, 667 (1990) ("'FOIA was not designed to benefit private litigants.'")). Rather, the relevant public purpose must be coextensive with FOIA's basic purpose — "to open agency action to the light of public scrutiny." *See Reporters Comm.*, 489 U.S. at 772–73. Therefore, disclosure of the letter is in the public interest only if it furthers the public's statutorily created "right to be informed about 'what their government is up to.'" *See id.* at 773.

The disclosure that Ortiz seeks will not significantly serve this public purpose. Although in this case disclosure of the

letter will reveal a great deal about the source, it will reveal virtually nothing about the conduct of the government. Enabling the public to learn about the conduct of a private citizen is not the type of public interest FOIA was intended to serve. *See id.* Moreover, Ortiz has made no showing, and has not even alleged, that HHS failed to adequately perform its investigative function. *See Massey, supra,* 3 F.3d at 625 (2d Cir. 1993).

> "[U]nless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is not reason to believe that the incremental public interest in such information would ever be significant."

Safecard Servs., Inc. v. SEC, 926 F.2d 1197, 1205–06 (D.C. Cir. 1991). Under these circumstances, the Court concludes that the public's interest in investigating HHS's performance by disclosure of this letter is negligible. *Accord id.* Accordingly, since the letter's source's private interest is substantial while the public interest in disclosure of the information is not, the Court finds that disclosure of the letter would reasonably be expected to constitute an unwarranted invasion of that privacy interest and that HHS properly utilized Exemption 7(C) to withhold the letter.[1]

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[1] HHS also argues that the letter sought by plaintiff falls within the purview of Exemption 6 of FOIA, 5 U.S.C. § 552(b)(6), which covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Since the letter is exempt under FOIA Exemptions 7(C) and 7(D) as protected law enforcement records, the Court need not reach the questions of whether the letter would have also been exempt as a "similar file" and, if so, whether its disclosure "would constitute an unwarranted invasion of personal privacy." The Court notes, however, that the requested letter is not as clearly a "similar" file within the scope of Exemption 6 as it is an "investigative record" within the scope of Exemption 7.

CONCLUSION

For the reasons stated above, the Court concludes that the complaint should be dismissed. The Clerk of Court is directed to enter judgment for the defendant and to close the above-captioned action.

SO ORDERED.

Dated: New York, New York
January 9, 1995

/s/ John E. Sprizzo

John E. Sprizzo
United States District Judge

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Special Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

BERNICE ORTIZ,

Plaintiff,

-against-

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

----------X

92 *CIVIL* 0562 (JES)

JUDGMENT

U.S. DISTRICT COURT
FILED
JAN 31 1995
S.D. OF N. Y.

Plaintiff having brought the action under the Freedom of Information Act, 5 U.S.C. Section 552 (1988), to obtain an anonymous letter to the Social Security Administration containing allegations about the plaintiff, defendant having withheld the letter from release on the grounds that disclosure of the letter would reasonably be expected to invade the privacy of the author and that the author is a confidential source of information for law enforcement purposes, and the said matter having come before the Honorable JOHN E. SPRIZZO, U.S.D.J., and the Court thereafter on January 19, 1995, having rendered its memorandum opinion and order (#74206); the Court finding that the letter is exempt from disclosure, and dismissing the complaint, and directing the Clerk of the Court to enter judgment for the defendant and to close the above-captioned action, it is,

ORDERED, ADJUDGED AND DECREED: That the Court finds that the letter is exempt from disclosure, and it is further,

ORDERED, that the complaint be and it is hereby dismissed, and it is further,

ORDERED, that the above-captioned action be and it is hereby closed.

DATED: NEW YORK, NEW YORK
January 31, 1995

/s/ James M. Parkison
Clerk

By: /s/ Ronald A. Church
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

DATE: November 22, 1995

Re: Ortiz v. HHS

Docket No(s).: 95-6050

Dear Counsel:

The court has issued its opinion in the above-entitled case, and the decision of the district court has been AFFIRMED.

Judgment was entered on November 22, 1995, and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form is enclosed herewith, and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the slip opinion are available from this office in accordance with Local Rule 0.17 (8).

If you are required by Rule 39(c) of the Federal Rules of Appellate Procedure to file an itemized and verified bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours,

GEORGE LANGE III, Clerk

By: _____
Oliva M. George
Deputy Clerk, USCA

opncvltr_frm

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

NOTICE

Local Rule effective July 1, 1992

0.40 Petitions for Rehearing

Each petition for rehearing shall include a copy of the opinion or summary order to which the petition relates.

If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding $250 against petitioner in favor of his adversary, to be collected with the costs in the case.

July 1, 1992

rehrg_frm

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

Docket No. 95-6050
Short Title: Ortiz v. HHS

Dear Counsel or Pro Se Litigant: <EDIT 1 of 1>

If you desire to file a bill of costs, enclosed is a form which you should use. Your bill of costs must be:

1. Served
2. Filed within 14 days after entry of judgment with proof of service
3. Verified
4. Clear as to the number of copies which comprise the printer's unit
5. Accompanied by printer's bills, which must include minimum charge for printer's unit
   a) of a page
   b) of a cover
   c) of footlines by the line
   d) of an index and table of cases by the page
6. Only for the number of necessary copies inserted in enclosed form
7. For actual costs at rates not higher than those generally charged such work in area where the Clerk's Office is located, otherwise subject to reduction.
8. Devoid of such items as postage, delivery charges, service charge, overtime and author's alterations.
9. One copy shall be filed with the original.

GEORGE LANGE III, Clerk

By: _____

Oliva M. George
Deputy Clerk, USCA

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ITEMIZED AND VERIFIED BILL OF COSTS

_____

Ortiz

v. Docket No. 95-6050

HHS

_____

Counsel for _____
respectfully submits, pursuant to Rule 39 (c) of the Federal Rules of Appellate Procedure the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the _____
and in favor of _____
for insertion in the mandate.

Docketing Action _____

Costs of printing appendix
(necessary copies _____) _____

Costs of printing brief
(necessary copies _____) _____

Costs of printing reply brief
(necessary copies _____) _____

(VERIFICATION HERE)

_____
(Signature)

itembcost_frm

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 249 August Term 1995

Argued: October 25, 1995 Decided: November 22, 1995

Docket No. 95-6050

----------X

BERNICE ORTIZ,

Plaintiff-Appellant,

- against -

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

----------X

Before: FEINBERG, OAKES and CALABRESI, Circuit Judges.

Plaintiff seeks disclosure under the Freedom of Information Act of an unsigned letter in the files of defendant Department of Health and Human Services, containing allegations concerning her eligibility to receive social security benefits. Plaintiff appeals from judgment in the United States District Court for the Southern District of New York, John E. Sprizzo, J., finding the letter exempt from disclosure and dismissing her complaint. The Court of Appeals, Feinberg, J., determined that the letter was compiled for law enforcement purposes, and its release could reasonably disclose the identity of a confidential source.

Judgment affirmed.

JONATHAN A. WEISS, New York, NY (Legal Services for the Elderly, Andrew J. Connick, of Counsel), for Plaintiff-Appellant.

SUSAN D. BAIRD, New York, NY, Assistant United States Attorney for the Southern District of New York (Mary Jo White, United States Attorney for the Southern District of New York, Steven I. Froot, Assistant United States Attorney, of Counsel), for Defendant-Appellee.

FEINBERG, Circuit Judge:

Plaintiff Bernice Ortiz seeks disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, of a document held by the Social Security Administration (SSA). The document is an unsigned letter received unsolicited by the Regional Inspector General for Investigations in New York of defendant Department of Health and Human Services (HHS). Ortiz contends that the letter contains false allegations concerning her eligibility to receive social security benefits. The letter resulted in a criminal investigation of Ortiz's eligibility, but HHS closed the investigation without charging Ortiz with a crime. Apparently, her benefits were not delayed, suspended or rescinded as a result of the investigation. Ortiz appeals from a judgment entered in January 1995 in the United States District Court for the Southern District of New York, John E. Sprizzo, J., finding the letter to be exempt from disclosure and dismissing her complaint. For the reasons stated below, we affirm.

I. Background

In November 1989, Ortiz requested disclosure of the letter from HHS.[1] Her request was denied in March 1990. The

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[1] The SSA was separated from the HHS and became an independent agency effective March 31, 1995. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 101, 110, 108 Stat. 1464, 1465, 1490 (1994). SSA is now properly the defendant in

(Footnote continued)

reason given by HHS for the denial was that under 5 U.S.C. § 552 (b)(7)(D) (Exemption 7(D)) the letter was exempt from FOIA disclosure because its release could disclose the identity of a confidential source. Ortiz's administrative appeal to HHS was denied in April 1991. The reasons given for the denial of the appeal were that the appeal was filed out of time, and that the letter was exempt from disclosure under both Exemption 7(D) and 5 U.S.C. § 552(b)(7)(C) (Exemption 7(C)), which authorizes the withholding of records where disclosure could constitute an unwarranted invasion of personal privacy.

In January 1992, Ortiz filed suit in the district court challenging HHS's determination and seeking disclosure of the letter. The parties stipulated to the admissibility of certain exhibits for judgment on an undisputed set of facts. Reviewing the letter in camera and conducting a de novo review of HHS's decision, the district court determined in a written opinion that the agency had properly withheld the letter. See 874 F. Supp. 570 (S.D.N.Y. 1995). The court found that Exemption 7(D) applied because the author was properly considered to be a confidential source and disclosure of any part of the letter was likely to reveal the author's identity. Id. at 574. Exemption 7(C) also applied because, balancing the privacy interest of the author of the letter against the public interest in disclosure, release of the letter would reasonably be expected to constitute an unwarranted invasion of privacy. Id. at 575–76. As indicated below, we find it necessary to consider only the Exemption 7(D) ruling.

II. Discussion

FOIA embodies a policy of encouraging public scrutiny of government activities by permitting broad access to records and other information. See Department of the Air Force v. Rose, 425 U.S. 352, 360–62 (1976). In FOIA cases, the government bears the burden of establishing that any exemption

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Ortiz's suit, id. at § 106(d), but at all relevant times prior to this appeal the letter was located in the files of HHS.

from disclosure applies. See 5 U.S.C. § 552(a)(4)(B). Courts must construe FOIA's statutory exemptions narrowly in favor of disclosure. See John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989).

5 U.S.C. § 552(b)(7), which is set out in full in the margin, provides that certain law enforcement records are exempt from disclosure.[2] In order to be exempt, the government must demonstrate that (1) the document was compiled for law enforcement purposes, and (2) release of the material would result in one of the harms, see note 2, enumerated in the statute. See Ferguson v. FBI, 957 F.2d 1059, 1065 (2d Cir. 1992).

Exemption 7(D) provides, in relevant part, that records or information "compiled for law enforcement purposes" may be

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[2] 5 U.S.C. § 552(b)(7) provides:

> (b) [The FOIA disclosure obligation] does not apply to matters that are —
>
> • • •
>
> (7) *records or information compiled for law enforcement purposes,* but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) *could reasonably be expected to disclose the identity of a confidential source,* including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . . . . (emphasis added)

withheld from disclosure if production "could reasonably be expected to disclose the identity of a confidential source." Exemption 7(D) is meant to (1) protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, see Brant Construction Co. v. United States EPA, 778 F.2d 1258, 1262 (7th Cir. 1985), and (2) "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." United Technologies Corp. v. NLRB, 777 F.2d 90, 94 (2d Cir. 1985).

A. Law Enforcement Purposes

The letter in this case was compiled for law enforcement purposes. HHS's Office of Inspector General (OIG) used the letter to launch a criminal investigation of Ortiz. The letter was kept in OIG's investigative files. The Inspector Generals of federal government agencies engage in law enforcement activities within the meaning of FOIA. See Providence Journal Co. v. United States Dept. of the Army, 981 F.2d 552, 563 n.13 (1st Cir. 1992) (Army Inspector General); Brant Construction Co., 778 F.2d at 1265 (Environmental Protection Agency Inspector General); New England Apple Council v. Donovan, 725 F.2d 139, 143 (1st Cir. 1984) (Dept. of Labor Inspector General).

Ortiz argues that because no actual crime was found to be committed and HHS's criminal investigation has ceased, there is no longer any valid law enforcement purpose to protect by withholding the letter. Exemption 7(D) is not limited to law enforcement activities where a crime was actually committed. The statutory scheme of preventing harm to the source and the agency's activities resulting from disclosure does not depend upon the actual existence of a crime. The status of the investigation is likewise immaterial to the application of the exemption. See Brant Construction Co., 778 F.2d at 1265 n.8 ("if the statutory requirements of 7(D) are met, exemption from disclosure is not extinguished with the termination of the investigation"); Pope v. United States, 599 F.2d 1383, 1387 (5th Cir. 1979) ("Exemption 7 is not rendered unavailable by

termination of [an] active investigation . . . ."). Cf. Diamond v. FBI, 707 F.2d 75, 76–77 (2d Cir. 1983) (documents do not lose their 7(D) exemption due to the passage of time), cert. denied, 465 U.S. 1004 (1984).

B. Confidential Source

The further application of Exemption 7(D) to the letter hinges on determining if the author was a "confidential source" for FOIA purposes. "[A] source is confidential within the meaning of Exemption 7(D) if the source 'provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.'" United States Dept. of Justice v. Landano, 113 S. Ct. 2014, 2019 (1993) (quoting S. Rep. No. 93-1200, p. 13 (1974) U.S. Code Cong. & Admin. News, pp. 6267, 6291). In this case, the letter was unsolicited by HHS, and there is no evidence that there has been any other contact between HHS and the author. Therefore, there could have been no assurance of confidentiality expressed to the author of the letter.

Absent express assurance, HHS must show that the particular circumstances surrounding a communication give rise to an implied assurance of confidentiality. In such a situation, "the question is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential." Landano, 113 S. Ct. at 2019 (emphasis in original).

In *Landano,* the Supreme Court addressed the evidentiary showing that the government must make in order to establish an implied assurance of confidentiality. Id. at 2017. The Court rejected a blanket presumption of implied confidentiality for any source who supplies information to the FBI during a criminal investigation, and required a particularized showing for each communication. Id. at 2021–23. Factors mentioned by the Court as having relevance to such a showing included "the character of the crime at issue" and "the source's relation to the crime." Id. at 2023. This court has also stated that

"courts may look to the risks an informant might face were her identity disclosed, such as retaliation, reprisal or harassment, in inferring confidentiality." Massey v. FBI, 3 F.3d 620, 623 (2d Cir. 1993).

It is true that the allegation of illegal activity in question here has little similarity to the gang-related murder in *Landano*. Nevertheless, we see no reason not to consider the same factors as relevant in both contexts. The reasoning of *Landano* is not confined to situations of violent crime and the possibility of equally violent retaliation. Exemption 7(D) protects the identity of a confidential source in civil as well as criminal law enforcement situations, and the protection extends to situations where the danger of retaliation encompasses more than the source's physical safety. See Irons v. FBI, 880 F.2d 1446, 1451 (1st Cir. 1989) (en banc). Cf. 5 U.S.C. § 552(b)(7)(F) (FOIA exemption which specifically covers situations where disclosure could "endanger the life or physical safety of any individual.").

After in camera review of the letter, we believe that the particular circumstances surrounding the communication of the information supplied by the author of the letter supports a finding of an implied assurance of confidentiality.

The letter concerned allegations of improper conduct by Ortiz that the author considered to be serious and possibly in violation of the law. The author could have reasonably concluded, indeed probably intended, that the letter would prompt a criminal investigation — as it did. Other circuits have held that serious and damaging allegations of misconduct that could initiate criminal investigations or lead to other serious sanctions can reflect an implied assurance of confidentiality. See Providence Journal, 981 F.2d at 565–66 (allegations that might have led to court-martial proceedings); Pope, 599 F.2d at 1386–87 (information given was intended to "provoke or contribute to" an investigation of attorney's fitness to practice in front of the Internal Revenue Service).

Also, it is evident from the nature of the allegations and the contents of the letter that the author was aware of personal

details of Ortiz's life. It is reasonable to assume that knowledge of such details places the source of that information close relationship with, or proximity to, Ortiz. This close relationship to the alleged wrongdoing further supports an implied assurance of confidentiality.

The possibility of retaliation or harassment is reasonable and genuine in a case such as this one where serious allegations are made by someone who may be quite close to the object of those allegations. As stated above, retaliation need not be violent to implicate Exemption 7(D). See United Technologies, 777 F.2d at 94 ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). In order to reach this conclusion, we need not consider the admission by Ortiz that she seeks the letter with the specific intention of suing the author. Nor must we determine if Ortiz's planned retaliation is unwarranted or improper. It is enough that retaliation might naturally flow from non-confidential treatment of the source's information and identity.

Ortiz argues that an assurance of confidentiality cannot be inferred when the source remains anonymous to the agency and when the information provided was unsolicited by it. Ortiz says that anonymity negates an implied assurance of confidentiality, arguing that "if the letter-writer's expectation was that the letter would be kept secret, as the Government contends, there would have been no need for the letter-writer to fail to sign the letter. The lack of a signature is proof-positive that the letter-writer anticipated that the letter might be provided to Mrs. Ortiz." We think this view flies in the face of a common-sense interpretation of anonymity as the desire to keep one's identity secret for any and all purposes. The wisdom of applying Exemption 7(D) to sources who choose anonymity is apparent in this case, where anonymity would not necessarily protect the author's identity if disclosure of the unsigned letter were allowed. It is true that anonymity primarily shows that a source wants to remain confidential rather than that there was any assurance that the source would be treated as confidential. But in the absence of any contrary

evidence from the surrounding circumstances, we view anonymity as an additional factor supporting an implied assurance of confidentiality. See Providence Journal, 981 F.2d at 566.

With respect to the unsolicited nature of the communication, it is not necessary to require some direct form of communication between the informant and the agency on the issue of confidentiality. In *Brant Construction Co.*, the Seventh Circuit addressed the application of an implied assurance of confidentiality to unsolicited communications by formulating the following test: "that in light of the information and surrounding circumstances, the communication in all likelihood would not have been made if confidentiality had not been assured." 778 F.2d at 1264. Under these circumstances, where serious allegations were made by a source who chose to remain anonymous and was privy to information of a personal nature regarding Ortiz which could reasonably have been thought to lead to a criminal investigation, it is reasonable to presume that the information would not have been provided if confidentiality had not been assured. The record does not show that HHS has taken any action inconsistent with such an assurance subsequent to receipt of the letter. HHS has generally made efforts, through the establishment of a telephone hotline (where information can be taken on an anonymous basis), to encourage the general public's cooperation in combatting fraud in their programs. Extending confidentiality to such communications reflects a common sense judgment given the importance and personal nature of the entitlement programs administered by HHS.

Considering all of the factors discussed above — the serious nature of the allegations, the author's apparently close relationship to Ortiz, the possibility of retaliation, and the author's anonymity — and without relying solely on any one of them, we conclude that the author spoke under an implied assurance of confidentiality and was therefore a confidential source within the meaning of Exemption 7(D).

C. Disclosure of the Confidential Source's Identity

The final Exemption 7(D) requirement is that release of the letter "could reasonably be expected to disclose the identity of a confidential source." The district court determined that a number of specific elements of the letter could reasonably lead to discovery of the author's identity. These included the grammar, syntax and language used in the letter, its typestyle, and certain items contained in the letter that would be known to only a few people. See 874 F. Supp. at 574. Upon review of the letter, we see no reason to question this determination.

Although it does not form the basis of our decision, in this case Ortiz seeks the letter for the specific purpose of inflicting the precise harm that Exemption 7(D) seeks to prevent. A proper analysis of Exemption 7(D) ordinarily concerns the law enforcement nature of the activities of the agency and the circumstances of the communication with the confidential source, not the specific purposes or interests of the party seeking disclosure. See United States Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989) ("Congress 'clearly intended' the FOIA 'to give *any* member of the public as much right to disclosure as one with a special interest [in a particular document].' ") (alteration in original) (emphasis added) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975)). However, Ortiz's candor in her communications with HSH and in her complaint and supporting affidavit makes explicit that this is precisely the type of situation that the statutory exemption seeks to address; namely, an aggrieved individual seeking information from a law enforcement agency that would lead to the discovery of the identity of an informant who offered information on a confidential basis in order to take action against that informant.

III. Conclusion

We have considered all of Ortiz's arguments that the district court erred in relying on Exemption 7(D) in refusing to release the letter, and we find them to be without merit. The

district court properly found that the government has met its burden of demonstrating that Exemption 7(D) applies. The judgment of the district court is affirmed.[3]

[3] On this view, we need not address HHS's contentions that (1) the requirements of Exemption 7(D) are also met in this instance because the letter is information furnished by a confidential source that was compiled in the course of a criminal ivnestigation and (2) disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy and the letter should be exempt from disclosure under Exemption 7(C).

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidances of the public —

> (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
>
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated

by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying —

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if —

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any

complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

> (i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
>
> (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

> (i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters

be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include —

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a) (6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a) (4) (F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a) (4) (E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub.L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub.L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247.